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No. 82-1412

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

v.

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 30, 1983

QUESTIONS PRESENTED

1. Did a provision of the Union Pacific land grant statute subjecting the granted lands to "settlement and preemption" under certain circumstances prohibit the Railroad from reserving minerals when it sold the lands at issue over 70 years ago to a ranching corporation that was not a settler and could make no claim to settlement and preemption rights?

2. Did the Court of Appeals abuse its discretion in declining to grant a last-minute request to certify to the Wyoming Supreme Court the interpretation of the mineral reservation in the deeds at issue, where (a) the meaning of the reservation had already been fully litigated and decided in two prior decisions of the Court of Appeals, (b) the Wyoming Supreme Court had cited the first federal decision on the question with approval and there were no Wyoming decisions even arguably to the contrary, and (c) there was uncertainty whether the state court would agree to decide the question if certified?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This Brief is submitted jointly by respondents Union Pacific Land Resources Corporation and Champlin Petroleum Company, and by respondent Amoco Production Company, who were the appellees in the court below, in opposition to the Petition for Certiorari in this case.

COUNTERSTATEMENT OF THE CASE

This is an action to quiet title to minerals in certain Wyoming lands granted to a predecessor of Union Pacific Railroad Company ("the Railroad")[1] and sold by deeds

[1] The grant was made to "The Union Pacific Railroad Company," a federally chartered company. That company was consolidated with other federal companies in 1880 to form Union Pacific Rail*way* Com-

executed in 1908 and 1909 ("the Deeds") that expressly reserved to the Railroad "all coal and other minerals." The Deeds conveyed these and other lands, subject to the mineral reservations, to a corporate commercial purchaser named Rigby Ranch Company ("Rigby"). Petitioners Moench Investment Company, Ltd., and Thousand Peaks Ranches, Inc. ("petitioners" or "Moench"), acquired Rigby's interest in the lands in 1936 and 1939.

In 1979, in the wake of oil and gas discoveries in the vicinity of these lands, Moench for the first time asserted claims to the minerals reserved by the Railroad 70 years before. One petitioner brought a suit in Utah federal court[2] contending that identical reservations in conveyances of neighboring Utah lands to Rigby were invalid as contrary to the "settlement and preemption" proviso of the Pacific Railroad Act of 1862 ("the Union Pacific Act"), which gave preemption rights to settlers on such Union Pacific land grant lands as had not been sold or disposed of within three years after completion of the railroad line authorized by the Act.[3] The Utah suit also contended that, under Utah law, oil and gas were not among the "minerals" reserved. The other petitioner brought a suit in Wyoming state court seeking interpretation of the same mineral reservations under Wyoming law with re-

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pany. The present Railroad, a Utah corporation, acquired the properties of the Rail*way* at mortgage foreclosure sales in 1898.

[2] *Moench Inv. Co.* v. *Union Pac. R.R.*, No. C-79-0914 (D. Utah), filed April 4, 1979.

[3] Section 3 of the Act provides in pertinent part that all lands granted thereunder "which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." 12 Stat. 489, § 3 (1862).

spect to some 109 acres of Wyoming land conveyed by one of the Deeds at issue here.[4]

Respondents[5] subsequently brought the present Wyoming federal court suit, which parallels Moench's Utah federal court suit, seeking to quiet title to the minerals reserved by the Railroad in the rest of the Wyoming lands owned by petitioners. This suit presents the same question of federal statutory law as Moench's suit in the District of Utah. It also requires interpretation of the same mineral reservations, albeit under Wyoming rather than Utah law. Respondents submitted the federal statutory question simultaneously to the two district courts on motions for summary judgment, requesting prompt resolution of the question by either or both courts. The question was decided by the District of Wyoming, and the District of Utah thereupon stayed its consideration of that question pending final judgment on appeal in this case.

In granting summary judgment to respondents, the District of Wyoming held that the reservations at issue "are lawful and valid reservations of minerals according to their terms, and are in no way contrary to or inconsistent with the Union Pacific Act." (App. 13a, ¶ 11.) The District Court also held, following its own prior decisions later affirmed by the Court of Appeals, that under Wyoming law the reservations unambiguously include oil and gas.

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[4] *Thousand Peaks Ranches, Inc.* v. *Union Pac. R.R.*, No. 69-1270 (3rd Dist., Uinta County, filed March 12, 1979), *removed*, No. C79-091K (D. Wyo.), *app. from summary judgment pending*, No. 83-1269 (10th Cir.).

[5] Respondents are, respectively, successors to the mineral interests reserved by the Railroad and an oil and gas lessee of one of these successors.

The Court of Appeals unanimously affirmed both these holdings. It rejected Moench's central contention that the settlement and preemption proviso impliedly required the Railroad to convey the entire fee whenever it sold land grant lands, and thus prohibited the reservation of minerals. The court noted that the language of the proviso does not "suggest" any such duty and there is "no legislative history that supports [Moench's] interpretation of the clause." (App. 7a.)

The court went on to say that "[a]t most," the proviso might have required conveyance of the entire fee to "*settlers seeking preemptive rights* to lands neither sold nor disposed of within three years of completion of the railway." (App. 7a, emphasis added.) The Rigby corporation concededly was not a settler and had no preemption rights (Petition at 16 n.14); and the possibility that a preempting settler might have had a claim that included minerals provided no support for petitioners' claims. The court then explained that there was no need to consider the possible rights of a hypothetical settler to lands not timely "sold or disposed of," because the lands in question "*were* sold or disposed of" by mortgage within three years of the railway's completion and had been "sold upon foreclosure of the mortgages" to the present Railroad (which later conveyed the surface to Rigby). (App. 8a, emphasis in original.)

As to the scope of the mineral reservation, the court relied upon its own prior interpretation of an identical Union Pacific mineral reservation under Wyoming law and on the analysis of Wyoming law by the Wyoming District Court in that case.[6] Following those holdings, the court held that oil and gas are "minerals" within the

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[6] *Amoco Production Co.* v. *Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980), *cert. denied*, 452

meaning of the reservation and that, "because the phrase [all coal and other minerals] is unambiguous, there is no need to resort to . . . supplementary materials . . . to determine the plain meaning of the reservation." (App. 10a, citation omitted.)

After the case was fully briefed and set for oral argument in the Court of Appeals, Moench requested for the first time that the interpretation of the mineral reservation be certified to the Wyoming Supreme Court for an advisory opinion as to Wyoming law.[7] No such request had been made in the District Court, in the docketing statement of issues on appeal, or in petitioners' main brief or reply brief on appeal. The belated request for certification did not explain why Moench had suddenly concluded that certification to a state court was required for a question which the Court of Appeals had already decided, and which Moench was simultaneously asking a Utah *federal* court to resolve under Utah law. The court declined to certify this question.

REASONS FOR DENYING THE WRIT

I. The Union Pacific Act Contention Tendered By The Petition Does Not Support Petitioners' Claims And Is Otherwise Inappropriate For This Court's Review.

The Petition asks this Court to decide the effect of an 1898 mortgage foreclosure sale on the hypothetical rights of settlers who might at some time seek to preempt Union Pacific land grant lands. That question is not presented by the facts of this case, since petitioners and their prede-

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U.S. 967 (1981). That interpretation was also reaffirmed in *Guild Trust* v. *Union Pac. Land Resources Corp.*, 475 F. Supp. 726 (D. Wyo. 1979), *aff'd*, 682 F.2d 208 (10th Cir. 1982).

[7] Motion of Defendants-Appellants for Certification to the Wyoming Supreme Court Pursuant to WYO. STAT. § 1-13-106, April 9, 1982.

cessor were not settlers or preemptors and since, as the Court of Appeals made clear, their interpretation of the Act is untenable regardless of the effect of the foreclosure sale.

In any event, the foreclosure issue raised by the Petition is of at most academic interest, unworthy of this Court's attention. It implicates no broad legal principle, and there is no showing that there are preempting settlers who have a stake in its resolution.

A. The Foreclosure Issue Is Of No Aid To Petitioners' Claim.

Petitioners' challenge to the validity of the mineral reservations depends on their contention that the settlement and preemption proviso of the Union Pacific Act should be read as a prohibition against mineral reservations by the Railroad in its sales of land grant lands to non-settlers like petitioners' predecessor, Rigby Ranch Company. Both courts below unequivocally rejected that interpretation of the statute. The Court of Appeals said:

> Neither do we find Moench's "settlement and preemption" clause argument persuasive. The language of the clause in no way suggests that the [railroad] grantee received only a limited fee barren of rights to whatever minerals might later be discovered. *Nor does the language suggest that the grantee was required to convey its entire fee to a purchaser.* Moench points to no legislative history that supports its interpretation of the clause. *At most the clause requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights* to lands neither sold nor disposed of within three years of completion of the railway.

(App. 7a., emphasis added.) As Moench admits, Rigby was not a settler and did not exercise preemption rights

on the lands at issue.[8] Therefore, under the plain language of the court's opinion, petitioners have no claim under the settlement and preemption proviso, whether or not settlers and preemptors had any rights under the proviso after the 1898 foreclosure sale.

The Petition nonetheless does not present for this Court's review the question that is dispositive of petitioners' claims, and for good reason. Moench has yet to state a coherent argument as to how a proviso subjecting undisposed-of lands to "settlement and preemption" could be read to prohibit mineral reservations in admittedly lawful sales of the lands that did not involve any settlement or preemption. It would be possible at least to comprehend a contention that all sales to non-settlers were themselves impliedly forbidden, on the theory that lands not disposed of within three years of completion should have been retained by the Railroad for the benefit of prospective settlers; but this is an argument petitioners understandably do not make, since it would defeat not only their claim to the minerals but their own title to the surface as well. The argument they attempt to make in its place—that the Railroad's alleged obligations to convey minerals *to settlers* required it to sell minerals to *non-settlers* (thereby making the minerals irrevocably unavailable to settlers)—does not pass the threshold of

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[8] Petition at 16 n.14. Whether "settlement and preemption like other lands" refers to the procedures authorized by the Preemption Act of 1841, 5 Stat. 453, or also includes homesteading under the Homestead Act of 1862, 12 Stat. 392, lands could be acquired through settlement only by bona fide individual settlers who actually settled the lands, and only in lots not larger than 160 acres per settler. Rigby was a corporation, not a settler; and it acquired a total of some 5,000 acres of land grant land in the Deeds at issue alone—over 30 times the maximum allowed to any settler.

minimum rationality.[9] It has no colorable support in the language or legislative history of the proviso or in any court decision.[10] The Court of Appeals' rejection of Moench's interpretation of the settlement and preemption proviso is unassailable, and the Petition is not so bold as to assail it directly.

The Petition does argue that the court's interpretation of the plain words of the proviso is inconsistent with the "governmental policy of guarding against monopolies of public lands by large corporations or single individuals." *Platt* v. *Union Pacific Railroad Co.*, 99 U.S. 48, 64 (1879). In fact, in the cited *Platt* case, this Court dis-

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[9] Petitioners contend that the reservation of minerals upon the sale of the surface to Rigby frustrated the settlement and preemption proviso by making it impossible for settlers thereafter to preempt the minerals. (Petition at 16-17.) But if the Railroad *had* conveyed the minerals to Rigby, they would have been equally unavailable for settlement and preemption. It was in fact the sale of *the surface* to a non-settler that prevented any future settlement and preemption of the lands. The reservation of the minerals in such a sale had no effect on any rights of prospective settlers. The Railroad was permitted, but not required, to sell the surface to non-settlers so long as there had been no settlement and preemption. *Union Pac. R.R.* v. *McShane*, 24 F. Cas. 640, 643 (C.C.D. Neb.) (No. 14,382), *aff'd*, 89 U.S. 444 (1874). As the court below held, it was equally free to sell or not to sell the minerals. Petitioners' theory that the Railroad had only two choices—to sell its entire interest to the Rigby corporation or to retain its entire interest for settlers—is pure invention, unsupported by the language or the legislative history of the statute.

[10] Indeed, petitioners have never contended that the statute could be construed to support petitioners' claim on summary judgment; their argument in the courts below was that they were entitled to discovery and a trial at which they would attempt to prove an alleged underlying congressional intent as a question of fact. Such attempts to imply unexpressed conditions in the Union Pacific Act are barred by decisions of this Court. *See* note 11 *infra*.

missed that very policy as one of the "incidental considerations" in the enactment of the Union Pacific Act, *id.* at 60, and held that in the settlement and preemption proviso that policy "was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant." *Id.* at 65. To the extent that discouraging monopolies was a policy of the Union Pacific Act, it was implemented by subjecting unsold lands to settlement and preemption, not by requiring sale of the land grant to large ranching corporations like Rigby.[11]

The question the Petition instead raises for review—whether settlement and preemption was possible after the foreclosure sale—was addressed by the Court of Appeals only in the context of considering the hypothetical possibility that "a settler seeking land under [the settlement and preemption proviso]" might be able to make the claim that the court had concluded Moench could not make. (App. 7a-8a.) Having determined that

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[11] Moreover, the attempt to imply in the proviso a prohibition not even suggested by its language flies in the face of this Court's recent unanimous confirmation in *Leo Sheep Co.* v. *United States* that there are no lurking unexpressed conditions to the Union Pacific land grant under the Union Pacific Act. 440 U.S. 668, 679, 681 (1979). As this Court reaffirmed in *Leo Sheep:*

> the intent of Congress in making the Union Pacific grants was clear: "it was to aid in the construction of the road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ."

Id. at 679 (emphasis added) (quoting *Missouri, Kansas & Texas Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878). *Accord, United States* v. *Union Pac. R.R.*, 28 F. Cas. 333, 340 (C.C.D. Conn. 1873), *aff'd*, 98 U.S 569 (1878) ("Whatever trust, guaranty, or protection [Congress] desired was reserved in express terms [in the Pacific Railroad Act]. *Implications are thereby excluded.*") (emphasis added).

the proviso "[a]t most . . . requires the grantee to stand in the government's shoes *with respect to settlers seeking preemptive rights* . . ." (App. 7a, emphasis added), the court had reason not to leave open the unwarranted implication that land grant lands are presently available for settlement and preemption, even though that hypothetical possibility was of no avail to Moench in any event. The court's conclusion that the possibility of settlement and preemption did not survive the foreclosure sale is, insofar as petitioners' claims are concerned, mere surplusage. A contrary conclusion would leave them still without a claim.

B. The Foreclosure Issue Is Otherwise Of Minimal Significance.

The Court of Appeals' treatment of the foreclosure issue does not, in any event, raise any substantial question. The effect of the foreclosure is an obscure question arising from unique circumstances under a *sui generis* statute. Neither the merits of this question nor its potential impact are worthy of this Court's review.

The Court of Appeals' discussion of the effect of the foreclosure sale follows routinely from this Court's interpretation of the settlement and preemption proviso in *Platt*, *supra*. The proviso opens to possible settlement and preemption only such lands as had not been "sold or disposed of" by the grantee within three years after completion of the entire railway. In *Platt*, this Court held that the mortgage on the land grant lands executed by the original railroad grantee in 1867 was a "disposition" within three years after completion for purposes of the proviso, so that the lands did not become subject to settlement and preemption. That holding disposed of all possible claims under the proviso, except under one contingency: If the mortgage debt were paid when due, the

mortgage trustees were to convey back to the original grantee (the mortgagor) any lands that had not been sold while subject to mortgage, thereby extinguishing the mortgage. 99 U.S. at 64. In that event, it might have been argued that the original disposition had not been final, and that the possibility of settlement and preemption was thereby revived. The *Platt* Court did not decide that settlement and preemption requirements would revive in the event of such a reconveyance to the mortgagor; it only made clear that it was expressing no view on that question. *Id.*

The court below likewise found it unnecessary to decide this question left open in *Platt*, because the contingency hypothesized in *Platt* did not occur. The lands were never reconveyed to the mortgagor (which had been consolidated with other land grant companies as Union Pacific Rail*way* Company), but were "in fact sold upon foreclosure of the mortgages" to the Railroad for the benefit of the Railway's creditors. (App. 8a.) After the foreclosure sale, there was no longer any possibility that the lands conveyed to the Railroad could revert to the Railway, and the question left open in *Platt* became moot. In so concluding, the Court of Appeals did not extend *Platt* or decide any new legal question. It merely explained why, under *Platt*, there is no longer any possibility that the "disposition" of the lands by mortgage in 1867 was not final.[12]

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[12] There can be no serious argument that the lands sold upon foreclosure were sold subject to settlement and preemption requirements. The Interior Department expressly recognized, in approving the foreclosure sale, that it would preclude the possibility of settlement and preemption. *Union Pac. R.R.*, 29 L.D. 38, 39, 41 (1899). The mortgage enabled the trustee to convey an unrestricted fee in the lands. *Platt*, 99 U.S. at 62. If the mortgaged lands had been

The Petition misconstrues this uncontroversial recital as a holding that the 1898 foreclosure sale was itself a "sale or disposition" within three years after completion within the meaning of the proviso. (Petition at 17.) No such argument was made to the Court of Appeals, and it is implausible that the Court thought that a sale occurring some 30 years after completion of the railway was a sale or disposition "within three years." When the court below states that "the lands at issue *were* 'sold or disposed of . . . within three years' of the railway's completion,"[13] the "disposition" it is referring to is unmistakably a disposition by mortgage as recognized in *Platt* and as discussed in the immediately following paragraph of the Court of Appeal's opinion. (App. 8a.)

The question whether such a "disposition" would be undone by the subsequent extinguishment of the mortgage is unique to the Union Pacific Act. Only under that pioneer land grant did a mortgage of the grant "dispose of" the lands and thereby relieve the original grantee of any obligation to open the lands to settlers. Under later land grant acts such as those construed by this Court in the *Northern Pacific*[14] and *Oregon & California*[15] cases relied upon in the Petition (at 17-19), mortgaging the lands had no such effect as a "disposition," and the ques-

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burdened by the settlement and preemption proviso, the mortgage could not have fulfilled its purpose, as explained in *Platt*, of generating the large sums of money needed for construction. *Id.* at 61-62.

[13] App. 8a (emphasis in original).

[14] *United States* v. *Northern Pac. Ry.*, 311 U.S. 317 (1940).

[15] *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915); 243 U.S. 549 (1917).

tion of the effect of extinguishment of the mortgages on a prior "disposition" by mortgage did not arise.[16]

The statute construed in *Oregon & California* contained a wholly different proviso, requiring without qualification that all granted lands "shall be sold to actual settlers only" in limited quantities at a prescribed price; and the Court held that it was a breach of that proviso *to sell* any interest in the lands to non-settlers like Moench and its predecessor. That holding has no relevance to petitioners' mortgage argument.

The statute in *Northern Pacific* did include a settlement and preemption proviso, subjecting to settlement and preemption lands not sold or disposed of within five years after completion of the railroad. But as the Petition concedes (at 18 n.15), that proviso contained additional language, referring expressly to the effect of a mortgage, that caused this Court to hold that the Northern Pacific's execution of a mortgage within five years did *not* relieve the grantee of its obligations of settlement and preemption even while the mortgage was outstanding. 311 U.S.

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[16] As this Court has often noted, Congress had changed its liberal policy toward railroad land grants by 1869, after the Union Pacific and other early experimental grants had proved successful. *Oregon & California R.R.* v. *United States*, *supra*, 238 U.S. at 414, 416; *Great Northern Ry.* v. *United States*, 315 U.S. 262, 273-75 (1942); *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 125-27 (1957) (Frankfurter, J., dissenting). The stricter requirements as to settlers imposed by the Oregon & California statute in 1869 and by amendment to the Northern Pacific statute in 1870 reflect that change of policy. The Union Pacific Act was the product of a different policy, in which the paramount objective was to provide a grant rich enough to induce private investors to attempt to build the first transcontinental railroad. *Platt*, *supra*, 99 U.S. at 48, 60, 65; *United States* v. *Union Pac. R.R.*, 91 U.S. 72, 80-81 (1875).

at 368.[17] Thus, unlike the Union Pacific lands under *Platt*, the Northern Pacific's lands were to be opened to settlement and preemption after five years "*whether the lands were then subject to mortgage or not.*" *Id.* (emphasis added). Since *Platt* was therefore inapplicable, the question of mortgage extinguishment left open in *Platt* was not presented.

The Petition nonetheless contends that the treatment of the mortgage foreclosure issue in the court below is inconsistent with *Northern Pacific* and *Oregon & California* because the provisos construed in those cases were held applicable to successors of the original grantees who, like the Railroad, acquired land grant properties through mortgage foreclosure sales. (Petition at 17-19.) But the issue here is not whether the Union Pacific Act bound the Railroad as a foreclosure purchaser to the same extent that it bound the original grantee; the issue is whether the lands were finally "disposed of" by the original grantee's mortgages, so that the proviso was satisfied. *Platt* had held that the Act did not require the original grantee to open lands to settlement and preemption after the execution of the 1867 mortgage. The court below merely concluded that the proviso *likewise* imposed no such requirement on the successor purchaser at the foreclosure sale, since the foreclosure sale resolved any question about the finality of the mortgage "disposition."

Moreover, even if the court's view of the effect of the foreclosure were mistaken, the mistake would be of hardly any consequence. The laws authorizing settlement and preemption on public lands, to which the land grant lands

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[17] The *Northern Pacific* proviso's terms subjected to settlement and preemption not only lands "not sold or disposed of" within the prescribed time, but also lands that "*remain subject to the mortgage by this act authorized . . . .*" 16 Stat. 378, 379 (1870) (emphasis added).

were made subject under the proviso, have been repealed,[18] and it is no longer possible to settle or preempt lands.[19] Thus, if the proviso "requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights," as the Court of Appeals hypothesized, the lands would not be burdened even if the proviso had not been satisfied, because there is no body of qualified settlers that could take advantage of it.

In sum, the esoteric question tendered for this Court's review under the Union Pacific Act is of no help to Moench's claims and of scant import to anyone else. In any event, it would be singularly inappropriate to adjudicate a question of hypothetical settlers' rights on the petition of Moench, which is not a settler and is not asserting such rights.

II. The Discretionary Denial Of A Belated Request To Certify A Question The Court Below Had Already Twice Decided Is Wholly Consistent With The Standards For Certification That Have Been Articulated By This Court.

Moench's last-minute request for certification of the interpretation of the mineral reservations at issue, made only after three years of litigation in the District Court and on appeal, appears to have been made primarily for purposes of this Petition. The Court of Appeals had previ-

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[18] The statutes creating settlement and preemption rights on public lands were repealed by the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1097, § 4. In 1873, it was clear to this Court that these were the laws to which lands granted under the Union Pacific Act were to be subjected. *See Railway Co.* v. *Prescott*, 83 U.S. (16 Wall.) 603, 609 (1873). But if the lands were also subject to settlement under the homestead laws, as petitioners have contended, those laws too have been repealed. Act of October 21, 1976, 90 Stat. 2787, 2788, § 702.

[19] *McDonald* v. *Union Pac. Ry.*, 97 N.W. 440, 441 (Neb. 1903).

ously declined to certify the very same question of Wyoming law in two prior cases; and the argument for certification in this case was far weaker after the meaning of the mineral reservation had already been fully litigated and finally decided on the merits. Moreover, Moench's contention that this question under Wyoming law is unsuited for decision by a federal court is difficult to reconcile with its own complaint seeking federal court resolution of the very same question under Utah law.

The Tenth Circuit is thoroughly familiar with the proposition that certification is in many circumstances an efficient means of deciding doubtful questions of state law presented in federal court suits. It has made use of certification on a number of occasions.[20] But, as petitioners acknowledge, resort to certification in a particular case is discretionary, not mandatory. The use of this procedure "rests in the sound discretion of the federal court." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974) ("*Lehman*").

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 395 (Rehnquist, J., concurring). It is difficult to imagine a case in which the exercise of the court's discretion to decide such a question without certification was better founded than in this one.

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[20] *E.g.*, *Parcell* v. *Governmental Ethics Comm'n*, 626 F.2d 160 (10th Cir. 1980); *Hoadley* v. *Heggie*, 617 F.2d 589 (10th Cir. 1980) (per curiam); *United States* v. *Criterion Ins. Co.*, 587 F.2d 39 (10th Cir. 1978); *United States* v. *United Banks*, 542 F.2d 819 (10th Cir. 1976); *Imel* v. *United States*, 523 F.2d 853 (10th Cir. 1975).

First, petitioners' belated motion for certification in the Court of Appeals was an attempt to evade the application of *stare decisis* by seeking to have redecided in a different forum a question already squarely decided in two prior cases.[21] Certification is not available as a means of forum shopping to relitigate an adverse precedent. The Fifth Circuit, which has made unusually expansive use of certification, has nonetheless made clear that

> [o]nce a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory amendment which makes this Court's decision clearly wrong.

Lee v. *Frozen Foods Express, Inc.*, 592 F.2d 271, 272 (5th Cir. 1979).

The reason for this rule is apparent. In the absence of some clear change in the applicable law, for a federal court to certify a question it has previously decided would be counterproductive, resulting in inefficiency and delay rather than the savings of "time, energy, and resources"

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[21] *See* cases cited at 4 n.6 *supra*. The possibility of certifying the question at issue to the Wyoming Supreme Court was expressly presented in both those cases, and the Court of Appeals there also concluded that the question should not be certified. See Appellants' Motion to Stay Proceedings and Motion for Abstention or, in the Alternative, for Certification, 10th Cir. No. 79-1236 (Aug. 31, 1979); Appellants' Objection to Calendar Assignment, Motion for Stay and Motion for Abstention, 10th Cir. No. 79-1568 (Aug. 31, 1979); Order of October 9, 1979, 10th Cir. No. 79-1236 (Oct. 9, 1979). It is at least arguable that the denial of certification in that litigation was *itself* controlling authority when certification of the same question was sought below on the eve of oral argument in the Court of Appeals.

contemplated in *Lehman*, 416 U.S. at 390-91. That is so *a fortiori* in this case, where the request for certification was made only after three years of litigation in federal court. And because certification could not have resolved the federal issue in the case, it would have resulted in the sort of "pointless and wasteful burden" on judicial resources that attends any "piecemeal litigation." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, No. 81-1203, slip op. at 25 (U.S. Feb. 23, 1983).

Second, unlike this Court's decision in *Lehman*, this was not a case in which the federal court was unfamiliar with the state law to be applied. In *Lehman*, a federal court in New York was called upon to decide a complex and novel question of Florida law. This Court said that certification seemed particularly appropriate on those facts,

> in view of the novelty of the question and the great unsettlement of Florida law, *Florida being a distant state.* When federal judges in New York attempt to predict uncertain Florida law, *they act . . . as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.*

416 U.S. at 391 (emphasis added). In contrast, in its prior decisions of this question the Court of Appeals expressly relied on the expertise of the resident Wyoming District Judge on such questions of Wyoming law. *Amoco Production Co.* v. *Guild Trust*, 636 F.2d at 264, *supra* ("*Guild Trust*").[22]

Third, unlike the question certified in *Lehman*, the question for which Moench sought certification was not a

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[22] *See also Fox* v. *Ford Motor Co.*, 575 F.2d 774, 781-73 (10th Cir. 1978); *Neu* v. *Grant*, 548 F.2d 281, 287 (10th Cir. 1977) (citing additional cases).

close one under Wyoming law. The *Guild Trust* decision adopted the approach recommended under Wyoming law by an eminent oil and gas authority in a leading *Wyoming Law Journal* article,[23] and relied heavily on other Wyoming authorities.[24] More important, by the time the issue reappeared in the instant case, the District Court decision in *Guild Trust* had been cited with approval in an analogous context by the Wyoming Supreme Court, *Coronado Oil Co.* v. *Grieves*, 603 P.2d 406, 412 (Wyo. 1979);[25] and petitioners have not cited a single Wyoming

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[23] Kuntz, "The Law Relating to Oil and Gas in Wyoming," 3 *Wyo. L. J.* 107, 112-15 (1949), *cited in Guild Trust*, 636 F.2d at 265, and in *Lazy D Grazing Ass'n.* v. *Terry Land & Livestock Co.*, 641 F.2d 844, 846 n.5 (10th Cir. 1981).

[24] *Guild Trust*, 636 F.2d at 264-65 (citing cases). *Guild Trust* reached the conclusion shared by the Tenth Circuit in interpreting nearly identical federal reservations of "all coal and other minerals" that have been in pervasive use in Wyoming deeds for nearly 70 years. *Skeen* v. *Lynch*, 48 F.2d 1044 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931). The Wyoming courts have squarely held that extrinsic evidence is inadmissible to interpret deeds that are unambiguous. Extrinsic evidence is admissible only if the mineral reservation has no settled meaning. *See Gregory* v. *Sanders*, 635 P.2d 795, 800 (Wyo. 1981); *Sunburst Exploration, Inc.* v. *Jensen*, 635 P.2d 822, 824-25 (Wyo. 1981); *Amoco Production Co.* v. *Stauffer Chemical Co.*, 612 P.2d 463, 465 (Wyo. 1980); *Shepard* v. *Top Hat Land & Cattle Co.*, 560 P.2d 730, 732 (Wyo. 1977).

[25] *Coronado* held that exploration for oil and gas is "mining" within the meaning of WYO. STAT. § 1-26-401 *et. seq.*, which allows corporations to condemn private property in order to obtain a way of necessity for, *inter alia*, mining purposes. The court cited *Guild Trust* and the authorities cited therein as showing that, when the 1907 statute was passed, in Wyoming "oil was considered generally to be a mineral and an oil well to be a mine." 603 P.2d at 411.

authority that casts doubt on the validity of the *Guild Trust* holding.[26]

Finally, it was uncertain whether the Wyoming Supreme Court would even accept a certified question in this case. That court had long been unreceptive to certification,[27] and although it finally did accept one certified question last year, it apparently still requires that the question certified be one that could finally resolve the entire case.[28] As noted above, certification could not have resolved the federal issue in this case, and the resulting uncertainty about the Wyoming Supreme Court's willing-

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[26] In addition, the conclusion of Wyoming law reached by the court below accords with the weight of authority in other states, that a reservation of "coal and other minerals" includes oil and gas as a matter of law. *See, e.g., Rowe* v. *Chesapeake Mineral Co.*, 156 F.2d 752 (6th Cir.), *cert. denied*, 329 U.S. 776 (1946); *Adkins* v. *Adams*, 152 F.2d 489 (7th Cir. 1945); *Shell Oil Co.* v. *Dye*, 135 F.2d 365 (7th Cir. 1943); *Burdette* v. *Bruen*, 118 W. Va. 624, 191 S.E. 360 (1937); *Failoni* v. *Chicago & N.W. Ry.*, 30 Ill. 2d 181, 195 N.E.2d 619 (1964); *Kentucky-West Virginia Gas Co.* v. *Browning*, 521 S.W.2d 516 (Ky. 1975); *Majors* v. *Easley*, 328 S.W.2d 834 (Ky. 1959); *Gibson* v. *Sellars*, 252 S.W.2d 911 (Ky. 1952); *Sellars* v. *Ohio Valley Trust Co.*, 248 S.W.2d 897 (Ky. 1952); *Schreier* v. *Chicago & N.W. Ry.*, 96 Ill. App. 2d 425, 239 N.E.2d 281 (1968); *Stewart Oil Co.* v. *Sohio Petroleum Co.*, 202 F. Supp. 952 (E.D. Ill. 1962), *aff'd*, 315 F.2d 759 (7th Cir.), *cert. denied*, 375 U.S. 828 (1963); *Warren* v. *Clinchfield Coal Corp.*, 166 Va. 524, 186 S.E. 20 (1936).

[27] See *Matter of Certified Question from the United States District Court, District of Wyoming: Hanchey* v. *Steighner*, 549 P.2d 1310 (Wyo. 1976). That decision imposed such a "severe restriction" on certification that Wyoming's certification statute was regarded as "virtually useless." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4248, at 526 (1978).

[28] *Rhodes* v. *Bush*, No. 5640 (Wyo. 1982) (Raper, J., concurring) (Wyoming certification statute requires that question be one that "may be determinative of the cause then pending in federal court").

ness to decide the state-law question if certified provided yet another reason not to protract this litigation further by an attempt at certification.

In the face of this compelling case against certification, petitioners seek to invoke the purported views of the State of Wyoming and the purported "opinion" of its Attorney General that the state-law issue was wrongly decided and that the issue should be submitted to the Wyoming state court. (Petition at 25.) The views ascribed to the State were expressed in litigation during the pendency of the *Guild Trust* suit by an Attorney General who had been co-counsel to the plaintiff in that case immediately before taking office, and who, upon taking office, brought parallel suits on behalf of the State of Wyoming involving Union Pacific mineral reservations on State lands. That Attorney General then sought to intervene in the *Guild Trust* case on appeal in support of his former client. After the final decision in the *Guild Trust* case, the State of Wyoming dismissed its own suits,[29] and is no longer claiming rights to oil and gas under Union Pacific mineral reservations in the form interpreted in this case. The State has taken no position in this litigation and is not supporting the Petition in this Court. In these circumstances, the litigating position once taken by a former Attorney General in the questionable circumstances described above is entitled to no weight on the question here presented.

For all these reasons, this case is not an example of the circumstances in which certification is a useful or even appropriate device, either for relieving congested federal

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[29] Stipulation of Dismissal with Prejudice, *State of Wyoming v. Union Pacific Corp.*, Civ. No. 3755 (3rd Dist., Sweetwater County, May 12, 1981).

dockets or for reliably ascertaining state law. The denial of certification below was a reasoned exercise of discretion, and it plainly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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